Finally, there is *PP* v *Soh Ted Foh*.[8] In that case the learned magistrate, after hearing objection from counsel, released the subject. In making the said order of release the learned magistrate indicated that she would be referring the case to the High Court purporting to do so under s 323 of the Criminal Procedure Code to determine the correctness of her order. Subsequently the record of the proceedings and her written ruling were sent to the High Court. The learned judge (Haidar J) examined the record of the proceedings and dealt with the interpretation of s 6 of the Act without first determining his jurisdiction to do so.

Order accordingly

Solicitors: *SH Lim & Co.*

Reported by *Prof Ahmad Ibrahim*

Sia Kwong Sang v Inspector General of Police & Ors and other appeals

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NOS 05-75-90, 05-76-90, 05-77-90, 05-78-90, 05-79-90, 05-80-90, 05-81-90, 05-82-90 AND 05-83-90
ABDUL HAMID OMAR LP, HASHIM YEOP A SANI CJ (MALAYA) AND JEMURI SERJAN SCJ
31 JANUARY 1991

Preventive Detention — Detention orders held ineffective by Supreme Court — Amendment Act to validate orders — Whether amendment Act valid and has legislative effect — Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1990, s 5

Constitutional Law — Amendment of legislation — Methods — Indirect amendment — Validity and legislative effect

The appellants in these appeals were detained under detention orders of the kind held by the Supreme Court to be defective in *Hong Siew Sin* v *Menteri Hal Ehwal Dalam Negeri & Ors*.[1] After that decision retrospective legislation was introduced and passed to render valid orders of the kind so held to be defective. The legislation was the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1990. The sole issue is whether s 5 of the amendment Act is valid and has legislative effect. The High Court had dismissed applications for habeas corpus and the appellants appealed. It was argued that s 5 of the amendment Act had not directly amended the parent Act and was therefore invalid and has no legislative effect.

Held, dismissing the appeals:

(1) Section 5 of the amending Act has adopted the referential or indirect method of amending the the statute. For the purpose of validating an act done under a statute the referential or independent method of amendment is the most appropriate method.

(2) The validity of s 5 of the amendment Act has already been recognized by the Supreme Court in *Poh Chin Kay* v *Menteri Hal Ehwal Dalam Negeri*.[2] Section 5 of the amendment Act is valid and has legislative effect.

[Bahasa Malaysia summary

Perayu-perayu di dalam kes-kes rayuan ini telah ditahan di bawah perintah tahanan sama seperti perintah yang telah diputuskan cacat dan taksah oleh Mahkamah Agung di dalam kes *Hong Siew Sin* lwn *Menteri Hal Ehwal Dalam Negeri & Lain-Lain*.[1] Selepas keputusan itu dibuat, perundangan kebelakangan telah dibuat dan diluluskan untuk mengesahkan perintah-perintah seperti yang telah diputuskan cacat itu. Perundangan itu ialah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) (Pindaan) 1990.

Isu tunggal di dalam kes ini ialah sama ada s 5 Akta Pindaan itu sah dan mempunyai kesan perundangan. Telah dihujjahkan bahawa Akta Pindaan itu tidak secara langsung meminda Akta pokok yang berkenaan dan oleh kerana itu ia adalah tak sah dan tidak mempunyai kesan perundangan.

Diputuskan, menolak rayuan-rayuan itu:

(1) Seksyen 5 Akta Pindaan itu telah menggunakan cara pindaan rujukan dan tak langsung untuk meminda statut itu. Untuk tujuan mengesahkan tindakan yang telah diambil dibawah sesuatu statut, cara rujukan atau bebas itu adalah cara yang sangat sesuai.

(2) Kesahan s 5 Akta Pindaan itu telah pun diiktiraf oleh Mahkamah Agung di dalam kes *Poh Chin Kay* lwn *Menteri Hal Ehwal Dalam Negeri*.[2] Seksyen 5 itu adalah sah dan mempunyai kesan perundangan.]

Cases referred to

1 *Hong Siew Sin & Anor* v *Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 90 (refd)
2 *Poh Chin Kay* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1990] 2 MLJ 297 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1990 s 5

Appeal from: Muar Criminal Application Nos 44-29-90, 44-110-90, 44-4-90, 44-105-90, 44-106-90, 44-107-90, 44-108-90, 44-111-90, 44-116-90 (High Court, Muar)

Karpal Singh for the appellants in Criminal Appeal Nos 05-75-90, 05-76-90 and 05-77-90.

V Shanmugam for the appellants in Criminal Appeal Nos 05-78-90, 05-79-90, 05-80-90, 05-81-90, 05-82-90 and 05-83-90.

Suriyadi bin Halim Omar (Deputy Public Prosecutor) (*Noorbahari bin Baharuddin* and *Jalaldin bin Hussain* with him) for the respondents.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): All the appellants in these appeals were detained under detention orders of the kind held by this court to be defective. See *Hong Siew Sin & Anor* v *Menteri Hal Ehwal Dalam Negeri*.[1]

After the decision was handed down by this court, retrospective legislation was then introduced and passed by Parliament to render valid orders of the kind held to be defective as aforesaid. That legislation was the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1990 ('the amendment Act').

A common point of law as preliminary objection was raised in all the habeas corpus proceedings in the High Court which became the subject of these appeals. The sole issue is whether s 5 of the amendment Act is valid and has legislative effect. Section 5 of the amendment Act reads as follows:

> (1) Where a detention order was made under subsection (1) of section 6 of the principal Act against any person during the period between the commencement of the principal Act and the commencement of this Act (hereinafter referred to as the 'transitional period'), the detention order and the detention effected in pursuance therefore during the transitional period, and its continuation thereafter, if any, are hereby declared lawful and valid, and shall be deemed to be, and to have always and at all times been, lawful and valid, notwithstanding that:
>
> (a) the period for which it was directed by that order that such peson be detained commenced from a date other than the date on which the detention order was made; or
>
> (b) the detention order was a fresh detention order made after the revocation of a previous detention order against such person.
>
> (2) No action, suit, prosecution or other legal proceeding whatsoever of any description or in any form shall be brought, instituted or maintained in any court on any ground after the commencement of this Act or, if brought or instituted before the commencement of this Act, shall continue to be maintained, for or on account of, or in respect of, anything lawfully done in relation to the detention order or the detention declared lawful and valid under subsection (1), save that the provisions of this subsection shall not apply to any such legal proceeding which had concluded and the final decision of the court in respect of which had been given before the commencement of this Act, or to any appeal in respect of such final decision.

The amendment Act was passed to amend the parent Act and it received the Royal Assent on 31 March 1990 and gazetted on 2 April 1990.

It can be seen that s 5 of the amendment Act consists of two subsections. Subsection (1) seeks to validate restrospectively all detention orders of the kind held to be defective by this court as aforesaid. Subsection (2) provides that no action, suit, prosecution or other legal proceeding shall be brought, instituted or maintained in any court on any ground after the commencement of the amendment Act or, if brought or instituted before the commencement of the amendment Act, shall continue to be maintained for or on account of anything lawfully done in relation to the detention order or the detention declared lawful and valid by subs (1).

The object of both subsections of s 5 of the amendment Act is to validate all detention orders of the kind held defective by this court except that the validation should not affect any legal proceedings which had concluded and the final decisions of the court given before the commencement of the amendment Act.

It was contended on behalf of the appellants that s 5 of the amendment Act is invalid on the grounds apparently that the said s 5 cannot be construed 'as being added to the principal or parent Act', and such provision can only be given force if it be made part of the parent Act by the process of amendment. Accordingly it was argued that s 5 did not constitute an amendment and was therefore invalid and has no legislative effect. It was also argued that s 5(1) of the amendment Act does not amount to anything and neither is it included into the parent Act. As such, so the argument goes, that section in its entirety should not be given legislative effect.

In the judgment of the learned Judicial Commissioner (Richard Talalla JC) in Muar High Court Criminal Application Nos 44-29 of 1990, 44-110 of 1990, 44-104 of 1990 and 44-33 of 1989, the argument of counsel was recorded in the following words:

> Counsel relied on two Indian decisions, namely, *Raman Sahadevan* v *R Kesavan Nair* AIR 1973 Kerala 136 (V 60 C 46) and *Khuda Bux* v *Manager, Caledonian Press* AIR 1954 Calcutta 484 (Vol 41, CN 165). In the latter case particular reference was made to the dictum of Chakravartti CJ at p 486. There the learned Chief Justice, in reference to the scope and effect of a repealing and amending Act, said:
>
> 'Such Acts have no legislative effect, but are designed for editorial revision, being intended only to excise dead matter from the statute book and to reduce its volume. Mostly, they expurgate amending Acts, because having imparted the amendments to the main Acts, those Acts have served their purpose and have no further reason for their existence.'

In our view the argument for the appellants is without merit. The technique of amending a legislation vary from jurisdiction to jurisdiction and the style and technique very much depend on the practice adopted in that particular jurisdiction.

Broadly speaking there are two methods of amending a statute. One method of amendment is the verbal amendment or otherwise referred to as the direct or textual method. This is the most common method and the best understood. It is commonly used in all Commonwealth countries.

The other method is the indirect method sometimes also called the referential or independent method. Section 5 of the amendment Act which is the subject of this appeal is of the latter type.

For the purpose of validating an act done under a statute the referential or independent method of amendment is the most appropriate method.

The validity of s 5 of the amendment Act was in fact already recognized by this court in *Poh Chin Kay* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*[2] where it was observed:

The scenario has of course changed with the passing of the Amendment Act A766 especially the omnibus validation by s 5 of that Act.

Section 5 of the amending Act certainly has legislative effect. The appeal on the preliminary point was accordingly dismissed.

Appeals dismissed.

Solicitors: *Karpal Singh & Co*; *Shanmugam & Co.*

Reported by *Prof Ahmad Ibrahim*

Malayan United Finance Bhd v Tay Lay Soon

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-197-90
ABDUL HAMID OMAR LP, AJAIB SINGH AND JEMURI SERJAN SCJJ
29 JANUARY 1991

Land Law — Charge — Indefeasibility of and priority over caveats — Land charged to appellants — Appellants commencing foreclosure proceedings — Sale of land made by registered proprietor to respondent — Respondent lodged caveats — Application by appellant to remove caveats — Whether purchaser has any right to redeem charge — Applicability of equity of redemption — National Land Code 1965, ss 244, 249(1), 266(1), 326, 327 & 340

In this case the registered proprietor of certain lands in Penang had charged them to the appellant to secure the repayment of the loan of $1,500,000 and interest. The registered proprietor having defaulted in the repayment of the said loan, the appellant took the preliminary steps with a view to commencing foreclosure proceedings to enforce the charge. It was found that two private caveats had been lodged against the land by the respondent after the registration of the charge. The caveats were based on a purported agreement by the registered proprietor to sell the lands to the respondent. There was a dispute between them and the respondent had brought an action for specific performance of the agreement. The appellants applied to have the caveats removed under s 327 of the National Land Code 1965. It was argued for the appellants that the charge on registration was indefeasible and ranked in priority over the caveats. The learned trial judge basing himself on the principles enunciated in *Eng Ah Mooi & Ors* v *Oversea Chinese Banking Corp Ltd*[3] held that the caveator had succeeded in showing a triable issue as between himself and the chargee and he dismissed the application. The appellants appealed.

Held, allowing the appeal:

(1) In this case the chargee had an indefeasible right by virtue of the registration of the charge and this right had priority over the caveats which were lodged five years after the registration of the charge.

(2) The respondent's proposition that he has a statutory or equitable right of discharge or redemption of a charge under the provisions of the National Land Code must be rejected. It is the chargor or the borrower who has the right to discharge the charge and the right to tender payment before the judicial sale is specifically and exclusively granted to the chargor. Since the right or interests in the charged land remains with the registered owner he has nothing to redeem. To speak of the equity of redemption or the like of it in the situation under the National Land Code is clearly technically and legally incorrect.

[Bahasa Malaysia summary

Di dalam kes ini tuanpunya berdaftar tanah di Pulau Pinang telah mencagarkan tanah itu kepada perayu untuk menjamin pembayaran hutang sejumlah $1,500,000 dan bunga. Tuanpunya itu telah gagal membayar hutang itu dan perayu telah mulai mengambil tindakan untuk membawa prosiding foreclosure bagi menguatkuasakan cagaran itu. Telah terdapat dua kaveat persendirian yang telah di serah-simpan oleh responden selepas pendaftaran cagaran itu. Kaveat-kaveat itu berdasar kepada apa yang dikata perjanjian oleh tuan punya tanah itu untuk menjual tanah itu kepada responden. Perkara itu telah dipertikaikan dan responden telah mengambil tindakan untuk mendapat pelaksanaan tepat perjanjian itu. Perayu telah memohon supaya kaveat-kaveat itu dihapuskan dibawah s 327 Kanun Tanah Negara 1965. Telah dihujjahkan bagi pihak perayu bahawa cagaran itu apabila didaftar tidak boleh disangkal dan harus diberi keutamaan keatas kaveat-kaveat itu. Hakim yang arif telah bersandar kepada prinsip-prinsip yang disebut di dalam kes *Eng Ah Mooi & Lain-Lain* lwn *Oversea Chinese Banking Corp Ltd*[3] dan telah memutuskan bahawa pengkaveat telah berjaya mengemukakan isu yang perlu dibicarakan antaranya dan pemegang cagaran dan ia menolak permohonan perayu. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Di dalam kes ini pemegang cagaran itu mempunyai hak yang tidak boleh disangkal oleh kerana cagaran itu telah didaftar dan hak ini diberi keutamaan keatas kaveat-kaveat yang telah diserahkan lima tahun selepas pendaftaran cagaran itu.

(2) Hujjah responden bahawa ia mempunyai hak disisi statut atau ekuiti untuk pelepasan atau penebusan suatu cagaran di bawah peruntukan Kanun Tanah Negara tidak boleh diterima dan harus ditolak. Yang mempunyai hak menebus cagaran itu ialah penggadai atau peminjam dan hak menawarkan pembayaran sebelum penjualan mengikut perintah mahkamah diberi cara khusus dan istimewa kepada penggadai. Oleh kerana hak tanah yang dicagarkan masih berada dalam tangan tuanpunya berdaftar, ia tidak ada apa-apa yang boleh ditebuskan. Menggunakan perkataan ekuiti penebusan (equity of redemption) dan sebagainya di dalam keadaan di Malaysia di bawah Kanun Tanah Negara adalah jelas tidak betul dari segi teknik dan undang-undang.]

Cases referred to

1 *Eng Mee Yong & Ors* v *V Letchumanan* [1979] 2 MLJ 212 (refd)
2 *Macon Engineers Sdn Bhd* v *Goh Hooi Yin* [1976] 2 MLJ 53 (refd)
3 *Eng Ah Mooi & Ors* v *Oversea Chinese Banking Corp* [1983] 1 MLJ 209 (not folld)
4 *Pearce* v *Morris* (1869) 5 LR Ch App 227 (refd)
5 *Tarn* v *Turner* (1888) 57 LJ Ch 452 (refd)
6 *Abigail* v *Lapin* [1934] AC 491 (refd)
7 *Haji Abdul Rahman* v *Mahomed Hassan* [1917] AC 209 (folld)

Legislation referred to

National Land Code 1965 ss 249(1), 255, 266(1), 326, 327, 340